

APR 20 2009

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6077

DATE COMPLAINT FILED: 9/24/08

LAST RESPONSE RECEIVED: 11/26/08

DATE ACTIVATED: 1/21/09

STATUTE OF LIMITATIONS: 8/08/13-
9/05/13

COMPLAINANT:

Minnesota Democratic-Farmer-Labor Party,
Brian Melendez, Chairman

RESPONDENTS:

Coleman for Senate '08 and Rodney A.
Axtell, in his official capacity as treasurer
Norm Coleman
The U.S. Chamber of Commerce
National Federation of Independent
Business's SAFE Trust and Tammy
Boehms, in her official capacity as
treasurer
Jeff Larson

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 441a
2 U.S.C. § 441d
2 U.S.C. § 434
11 C.F.R. § 100.26
11 C.F.R. § 100.29
11 C.F.R. § 100.52(d)
11 C.F.R. § 109.20(b)
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Minnesota Democratic-Farmer-Labor Party, through its Chairman, Brian
Melendez, alleges that Norm Coleman ("Coleman"), Coleman for Senate '08 ("CFS")

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1 and Rodney A. Axtell, in his official capacity as treasurer, coordinated communications
2 with the U.S. Chamber of Commerce ("the Chamber"); the National Federation of
3 Independent Business's separate segregated fund, the Save America's Free Enterprise
4 (SAFE) Trust and Tammy Boehms, in her official capacity as treasurer ("NFIB"); and
5 Jeff Larson (hereinafter, collectively the "Respondents") and thereby accepted prohibited
6 corporate in-kind contributions in the form of the Chamber's three television
7 advertisements and accepted an excessive in-kind contribution in the form of the NFIB's
8 newspaper advertisement. The Complaint bases its allegation on an asserted "close knit
9 web of relations" between the Respondents, and an asserted common vendor relationship
10 between the Chamber/NFIB and Coleman/CFS through Jeff Larson and his company
11 FLS Connect. In addition, the Complaint alleges reporting violations on the part of
12 Respondents.

13 CFS, the Chamber, NFIB, and Jeff Larson responded separately to the Complaint,
14 asserting on the basis of sworn affidavits that no coordination occurred regarding the
15 advertisements. Respondents emphasize that FLS Connect did not perform any work on
16 the Chamber ads or the NFIB ad at issue in this Complaint, and they seek dismissal of the
17 Complaint and closure of the file.

18 Based upon the Complaint and responses and other available information, it
19 appears that the advertisements in question did not constitute coordinated
20 communications. See 11 C.F.R. § 109.21. Accordingly, we recommend that the
21 Commission find no reason to believe that Respondents violated the Federal Election
22 Campaign Act of 1971, as amended ("the Act") in this matter as to the alleged making

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and acceptance of in-kind contributions, or as to the failure to report such contributions.

We further recommend that the Commission close the file in this matter.

II. FACTUAL AND LEGAL ANALYSIS

A. FACTUAL BACKGROUND

1. Television Ads by the Chamber

Complainant asserts that three Chamber-produced television ads aired in Minnesota prior to the 2008 U.S. Senate election may have been coordinated with Senator Norm Coleman's campaign and thus may constitute prohibited corporate contributions from the Chamber to the campaign.¹ The three television ads discussed in the Complaint focused on the positions of Coleman's opponent, Democratic Senate candidate Al Franken, on the Employee Free Choice Act and tax increases, and on Coleman's achievements as a Senator on health care, respectively. According to the Complaint, the television ads aired on August 8, August 28, and September 4, 2008, prior to Minnesota's primary election on September 9, 2008. See Complaint at 2-3.² The Chamber acknowledges that these television ads were paid for and aired by the Chamber on Minnesota television stations. See Chamber Response at 4. For the two Chamber ads that aired fewer than 30 days before the primary election, the Chamber disclosed its payments of \$199,463.00 and \$349,967.00 for the ads as electioneering communication expenditures. See 2 U.S.C. § 434(f).

¹ The Chamber is an incorporated trade association.

² The first two ads are found on YouTube at <http://www.youtube.com/watch?v=BcFYLN6uSk> and at <http://www.youtube.com/watch?v=9x9IvB-aIvI>. The YouTube link in the Complaint to the third ad, discussing Coleman's achievements in health care, does not permit access to the ad in question. However, a YouTube search for "Chamber of Commerce Norm Coleman health care" yields only one ad, a 30-second spot with proper disclaimer information from the Chamber posted on YouTube on September 5, 2008, the day after the Complaint claims the Chamber's Coleman healthcare ad was aired on Minnesota TV. This ad, therefore, appears to be the ad in question, and is accessible at http://www.youtube.com/watch?v=97OEZ3_nZXg.

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2. Newspaper Ad by NFIB

Complainant also alleges that the NFIB ran a full-page newspaper ad in Minnesota prior to the 2008 U.S. Senate election that may have been coordinated with the Coleman campaign and thus may constitute an excessive in-kind contribution from the NFIB to the campaign. The print ad is titled "Take a Quick Quiz and See if You're One of the Minnesotans Who Would Have Their Taxes RAISED by Al Franken," and contains the NFIB SAFE Trust's endorsement of Norm Coleman. See Attachment A to Complaint. The NFIB's ad ran on September 5, 2008, in the *St. Paul Pioneer Press* and the *Minneapolis Star Tribune*, prior to the Minnesota primary election on September 9, 2008. On September 4, 2008, the NFIB disclosed its payment of \$84,426.00 for this ad as an independent expenditure on Schedule E.

B. LEGAL ANALYSIS

Under the Act, no multicandidate political committee, such as the NFIB's SAFE Trust, may make a contribution, including an in-kind contribution, to a candidate and his authorized committee with respect to any election for Federal office, which in the aggregate exceeds \$5,000. 2 U.S.C. § 441a(a)(2); see 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. § 100.52(d)(1). No candidate or his authorized committee shall knowingly accept a contribution in excess of such limit. See 2 U.S.C. § 441a(f). Also, corporate contributions, including in-kind contributions, to a federal candidate and his authorized political committee are prohibited, and candidates and their authorized committees are prohibited from knowingly accepting such contributions. 2 U.S.C. § 441b(a). The Act defines in-kind contributions as, *inter alia*, expenditures made by any person "in

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1 cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate,
2 his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i).

3 **1. Coordinated Communications**

4
5 A communication is coordinated with a candidate, an authorized committee, or
6 agent thereof if it meets a three-part test: (1) payment for the communication by a third
7 party; (2) satisfaction of one of four "content" standards; and (3) satisfaction of one of six
8 "conduct" standards. 11 C.F.R. § 109.21.

9 **a. Payment**

10 In this matter, the first prong of the coordinated communication test is satisfied as
11 to both the Chamber's ads and the NFIB's ad because both the Chamber and the NFIB
12 acknowledge paying for the ads in question. 11 C.F.R. § 109.21(a)(1); see Chamber
13 Response at 4 and NFIB Response at 1.

14 **b. Content**

15 The content prong is satisfied where the communication at issue meets one of the
16 following content standards: an electioneering communication under 11 C.F.R. § 100.29;
17 a public communication that republishes, disseminates, or distributes candidate campaign
18 materials; a public communication containing express advocacy; or a public
19 communication that refers to a clearly identified federal candidate that was publicly
20 distributed or disseminated 90 days or fewer before a primary or general election, and
21 was directed to voters in the jurisdiction of the clearly identified federal candidate.
22 11 C.F.R. § 109.21(c)(1) - (4).³

³ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective

1 The public communications portion of the content standard appears to be satisfied
2 as to both the Chamber's television ads and the NFIB's newspaper ad because all of the
3 advertisements clearly identify either Coleman or Franken, who were each candidates in
4 the 2008 U.S. Senate election in Minnesota, and because the ads were broadcast or
5 published within 90 days of the September 9, 2008, primary as well as the November 4,
6 2008, general election within the State of Minnesota.⁴ See 11 C.F.R. § 109.21(c)(4)(i).

7 **c. Conduct**

8 The six conduct standards of the coordinated communication test include
9 situations in which the communication is created, produced, or distributed 1) at the
10 request or suggestion of the candidate, his committee, or an agent thereof; 2) with the
11 material involvement of the candidate, the committee, or agent; 3) after a substantial
12 discussion with the candidate, committee, or agent; 4) by a common vendor; 5) by a
13 former employee or independent contractor; or 6) via republication of campaign material.
14 11 C.F.R. § 109.21(d).

July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. See *Shays v. F.E.C.*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying in part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. June 13, 2008). The activity at issue in this matter occurred after the July 10, 2006, effective date of the revisions to Section 109.21.

⁴ The latter two of the Chamber's television ads also appear to meet the "electioneering communication" content standard in that the Chamber disclosed its payments for the ads as electioneering communication expenditures. See 2 U.S.C. § 434(f), 11 C.F.R. §§ 100.29(a) and 11 C.F.R. § 109.21(c)(1). In addition, the NFIB ad may meet the express advocacy content standard, see 11 C.F.R. §§ 100.22 and 109.21(c)(3), in that the NFIB filed an independent expenditure report disclosing its payment for the ad. See 2 U.S.C. §§ 431(17) (defining independent expenditures) and 434(g) (providing timelines for reporting independent expenditures).

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1 The Complaint states that the advertisements at issue “may also meet the third
2 prong” of the test, alleging that the “close-knit web of relations between Senator
3 Coleman, the Chamber, NFIB, Jeff Larson, and FLS-Connect ... taken together, support
4 the inference that the advertisements were produced at the request of Senator Coleman or
5 his agent, with Senator Coleman’s material involvement, or after substantial discussion
6 with Senator Coleman or his agent.” Complaint at 4-5. Available information indicates
7 that Larson and Coleman have many connections, including 1) Larson’s service as a
8 long-time advisor for Senator Coleman, 2) Larson’s service as the treasurer of Coleman’s
9 Northstar Leadership PAC, and 3) Coleman’s employment of Larson’s wife in one of his
10 local constituent offices in Minnesota. Also, media reports show that Larson has been
11 renting Coleman an apartment in D.C. for \$600 per month. See Complaint at 5.⁵ The
12 Complaint alleges that Coleman, the Chamber, and NFIB have all been clients of
13 Larson’s firm, FLS Connect, and that the coordination took place through Larson as
14 Coleman’s agent. *Id.* The Complaint further cites this business relationship to support an
15 allegation of coordinated communications through FLS Connect as a common vendor.
16 *Id.* The available information does not support the Complaint’s allegations.

17 Addressing complainant’s last allegation first, a vendor is a “common vendor” for
18 the purposes of the Act only if the same vendor creates or distributes the ad alleged to be
19 coordinated and, within 120 days, has provided specified services for the candidate
20 alleged to have benefitted from the coordination. See 11 C.F.R. § 109.21(d)(4). In his

⁵ The Complaint raised the apartment rental to show the relationship between Coleman and Larson, and does not assert a resulting violation of the Act. This apartment rental has engendered numerous newspaper articles and a formal complaint to the Senate Ethics Committee. It is not clear that Coleman’s rent was below the reasonable fair-market rent, which would be difficult to measure given that the articles indicate that the apartment has no kitchen. Accordingly, we make no recommendation as to whether the rental may constitute an in-kind contribution from Larson to Coleman.

1 response and his sworn affidavit, Jeff Larson denies contracting for, or otherwise
2 participating in, the creation, production, or distribution of the Chamber's or NFIB's
3 advertisements related to the 2008 Minnesota Senate campaign, or otherwise acting as a
4 coordinator for these communications. See Larson Response at 1-2; Larson Affidavit at
5 1-2. More broadly, Larson denies under oath that FLS Connect performed any work at
6 all for the NFIB during the 2008 election cycle, and denies that FLS Connect did any
7 work for the Chamber during the 2008 election cycle other than membership drive
8 telemarketing, and both the Chamber and the NFIB confirm Larson's assertions. See
9 Larson Affidavit at 1-2; NFIB Response at 2 and attached Affidavit of NFIB vice
10 president Lisa Goetas at ¶2; Chamber Response at 2 and 10.⁶

11 To fulfill the common vendor standard of the conduct prong, it is not sufficient
12 for the entities involved to have merely hired the same commercial vendor for different
13 work at various points in the past. Instead, the common vendor must be performing work
14 for the candidate or the candidate's committee within 120 days of creating, producing, or
15 distributing the specific communication(s) alleged to have been coordinated, see
16 11 C.F.R. § 109.21(d)(4)(ii), which FLS Connect, the alleged common vendor, has
17 denied through sworn affidavits this case. Thus, the available information indicates that
18 FLS Connect is not a common vendor for the purposes of the Act.

19 In response to the Complaint's inference that the advertisements were produced at
20 the request of Senator Coleman or his agent, with Senator Coleman's material
21 involvement, or after substantial discussion with Senator Coleman or his agent, all

⁶ Larson also referenced FLS Connect's firewall policies, which were in place at the time of the events in this matter, and which the Commission considered in MUR 5546 (Progress For America Voter Fund) and found sufficient to rebut an allegation of coordination in that matter. See Larson Response at 1; 11 C.F.R. § 109.21(h) (conduct standards' safe harbor for establishment and use of a firewall).

1 Respondents deny any involvement by, or coordination with, Senator Coleman, CFS, or
2 any agent thereof in the creation or distribution of the ads. See 11 C.F.R. § 109.21(d)(1)-
3 (3). CFS campaign manager Cullen Sheehan denied under oath any knowledge of the
4 Chamber and NFIB ads or their contents prior to their release, and denied providing
5 either the Chamber or the NFIB with any information regarding the campaign. See CFS
6 Response at 1-2; Sheehan affidavit at 1-2. The Chamber and the NFIB deny seeking or
7 gaining any information from Coleman or CFS for the ads, and they deny using Jeff
8 Larson or FLS Connect in any way in the preparation and dissemination of these ads. See
9 Chamber Response at 10, NFIB Response at 1-2, Affidavit of NFIB vice president Lisa
10 Goeas at ¶¶ 2 and 5.

11 There is no other support offered for the Complaint's allegation as to the
12 coordinating conduct. Unwarranted legal conclusions from asserted facts, or mere
13 speculation, will not be accepted as true, and "[s]uch speculative charges, especially
14 when accompanied by direct refutation, do not form an adequate basis to find reason to
15 believe that a violation of FECA has occurred." Statement of Reasons in MUR 4960
16 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee), issued December 21,
17 2000 (citations omitted). Here, Complainant's inferences are convincingly refuted by the
18 responses of Coleman, CFS, Larson, the Chamber, and the NFIB, who consistently deny
19 knowledge of each other's actions with regard to the 2008 campaign in general or these
20 advertisements in particular, and deny any coordinating activity. The conduct prong of
21 the coordinated communications test does not appear to be fulfilled in this matter, and so
22 the Chamber's and NFIB's communications do not appear to have been coordinated with
23 Coleman or CFS. Accordingly, the Chamber and the NFIB do not appear to have made

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corporate and excessive contributions, respectively, to Coleman or CFS. See 2 U.S.C. §§ 441a(a), 441b, and 441a(f).

2. Reporting Violations

The Complaint suggests that if the communications at issue are found to be coordinated communications, then Respondents failed to disclose the resulting contributions. See 2 U.S.C. § 434. As there appears to be no support for a finding that the communications in this case were coordinated among the Respondents, there is no reason to believe Respondents violated the reporting provisions of the Act.

C. CONCLUSION

For the reasons set forth above, we recommend that the Commission find no reason to believe that Coleman for Senate '08 and Rodney A. Axtell, in his official capacity as treasurer, Norm Coleman; Jeff Larson; the U.S. Chamber of Commerce; and the National Federation of Independent Business's SAFE Trust and Tammy Boehms, in her official capacity as treasurer, violated the Act in connection with the alleged coordinated communications. We also recommend that the Commission close the file as to all Respondents.

III. RECOMMENDATIONS


1. Find no reason to believe that Coleman for Senate '08 and Rodney A. Axtell, in his official capacity as treasurer, Norm Coleman; Jeff Larson; the U.S. Chamber of Commerce; and the National Federation of Independent Business's SAFE Trust and Tammy Boehms, in her official capacity as treasurer, violated the Act in connection with the alleged coordinated communications and reporting violations in this matter.
2. Approve the attached Factual and Legal Analyses.
3. Approve the appropriate letters.

4. Close the file.


Thomasenia P. Duncan
General Counsel

4/20/09
Date

BY:


Stephen Gura
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